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DEC 07 2009

OFFICE OF PETITIONS

In re Application of
Keene
Application No. 10/623,936
Filed: 21 July, 2003
Attorney Docket No. 5-904

DECISION

This is a decision on the petition filed on 19 August, 2009, pursuant to 37 C.F.R. §1.137(b) for revival of an application abandoned due to unintentional delay.

The petition under 37 C.F.R. §1.137(b) is **DISMISSED**.

NOTE:

The 11 April, 2006, dismissal of the 15 March, 2006, petition pursuant to 37 C.F.R. §1.181 to withdraw the holding of abandonment contained the following caution to Petitioner and Applicant: "A petition to revive on the grounds of unintentional delay must be filed promptly and such petition must be accompanied by the reply (the amendment), the petition fee, and a statement that "the entire delay in filing the required reply from the due date for the reply until the filing of a grantable petition was unintentional."

It appears that the petition of 19 August, 2009, is the first substantive action taken since that decision.

Petitioner and Applicant have not detailed the underlying facts of the more than 40 month delay since that decision and must do so on any renewed petition.

Any further petition to revive must be submitted within TWO (2) MONTHS from the mail date of this decision. Extensions of time under 37 C.F.R. §1.136(a) are permitted. The reconsideration request should include a cover letter entitled "Renewed Petition under 37 C.F.R. §1.137(b)."

This is **not** a final agency action within the meaning of 5 U.S.C. §704.

As to the Allegations
of Unintentional Delay

The requirements of a grantable petition pursuant to 37 C.F.R. §1.137(b) are the petition and fee therefor, a reply, a proper statement of unintentional delay under the regulation, and, where applicable, a terminal disclaimer and fee. (However, it does not appear that a terminal disclaimer and fee are due here.)

Petitioner does not appear to have addressed satisfactorily the statement/showing-of-delay requirement under the rule. This deficiency must be overcome.

Petitioners' attentions always are directed to the guidance in the Commentary at MPEP §711.03(c)(II).

BACKGROUND

The record reflects as follows:

Former Counsel/then-Petitioner failed to reply timely and properly to the final Office action mailed on 28 June, 2005, with reply due absent an extension of time on or before 28 September, 2005;

The application went abandoned after midnight 28 September, 2005;

The Office mailed the Notice of Abandonment on 2 February, 2006;

On 18 March, 2006, former Counsel/then-Petitioner filed a petition pursuant to 37 C.F.R. §1.181 to withdraw the holding of abandonment, but included therewith only an averment that Petitioner timely filed the reply in question and copies of the papers averred to have been timely filed—in so doing, former Counsel/then-Petitioner appeared to have ignored the requirements set forth at MPEP §711.03(c). The petition was dismissed on 11 April, 2006, with an 11 June, 2006, due date for any further petition by former Counsel/then-Petitioner and/or Applicant.

It appears that a 31 December, 2007, Revocation/Power of Attorney was entered/acknowledged on 14 January, 2008, and the acknowledgement thereof returned to the Office on 22 January, 2008.

A subsequent Revocation/Power of Attorney was filed on 6 May, 2009.

On 19 August, 2009, Petitioner filed a petition pursuant to 37 C.F.R. §1.137(b), with fee, a reply in the form of a request for continued examination (RCE) with fee and submission in the form of an amendment pursuant to 37 C.F.R. §1.114, and made a statement of unintentional delay—however, it does not appear that Petitioner was the person in whose control the application was at the time of abandonment and there is no showing provided as to the factual basis for the averred unintentional delays that have occurred since midnight 28 September, 2005, and since midnight 1 June, 2006, (the reply due date for any renewed petition following the 11 April, 2006, decision).

Again, Petitioners' attentions always are directed to the guidance in the Commentary at MPEP §711.03(c)(II).

The availability of applications and application papers online to applicants/practitioners who diligently associate their Customer Number with the respective application(s) now provides an applicant/practitioner on-demand information as to events/transactions in an application.

Out of an abundance of caution, Petitioners always are reminded that those registered to practice and all others who make representations before the Office must inquire into the underlying facts of representations made to the Office and support averments with the appropriate documentation—since all owe to the Office the continuing duty to disclose.¹

STATUTES, REGULATIONS AND ANALYSIS

Congress has authorized the Commissioner to "revive an application if the delay is shown to the satisfaction of the Commissioner to have been "unavoidable." 35 U.S.C. §133 (1994).² The regulations at 37 C.F.R. §1.137(a) and (b) set forth the requirements for a Petitioner to revive a previously unavoidably or unintentionally, respectively, abandoned application under this congressional grant of authority.

Unintentional delays are those that do not satisfy the very strict statutory and regulatory requirements of unavoidable delay, and also, by definition, are not intentional.³)

¹ See supplement of 17 June, 1999. The Patent and Trademark Office is relying on petitioner's duty of candor and good faith and accepting a statement made by Petitioner. See Changes to Patent Practice and Procedure, 62 Fed. Reg. at 53160 and 53178, 1203 Off. Gaz. Pat. Office at 88 and 103 (responses to comments 64 and 109)(applicant obligated under 37 C.F.R. §10.18 to inquire into the underlying facts and circumstances when providing statements to the Patent and Trademark Office).

² 35 U.S.C. §133 provides:

35 U.S.C. §133 Time for prosecuting application.

Upon failure of the applicant to prosecute the application within six months after any action therein, of which notice has been given or mailed to the applicant, or within such shorter time, not less than thirty days, as fixed by the Commissioner in such action, the application shall be regarded as abandoned by the parties thereto, unless it be shown to the satisfaction of the Commissioner that such delay was unavoidable.

³ Therefore, by example, an unintentional delay in the reply might occur if the reply and transmittal form are to be prepared for shipment by the US Postal Service, but other pressing matters distract one's attention and the mail is not timely deposited for shipment.

As to Allegations of
Unintentional Delay

As indicated above, the requirements of a grantable petition pursuant to 37 C.F.R. §1.137(b) are the petition and fee therefor, a proper reply, a proper statement and/or showing of unintentional delay under the regulation, and, where applicable, a terminal disclaimer and fee.

As discussed above, it does not appear that Petitioner has satisfied the statement/showing-of-delay requirement under the rule.

CONCLUSION

Accordingly, the petition under 37 C.F.R. §1.137(b) is dismissed.

Further correspondence with respect to this matter should be addressed as follows:

By Mail: Mail Stop PETITION
 Commissioner for Patents
 P. O. Box 1450
 Alexandria, VA 22313-1450

By hand: U. S. Patent and Trademark Office
 Customer Service Window, Mail Stop Petitions
 Randolph Building
 401 Dulany Street
 Alexandria, VA 22314

By facsimile: **(571) 273-8300**
 Attn: Office of Petitions

Telephone inquiries regarding this decision may be directed to the undersigned at (571) 272-3214—it is noted, however, that all practice before the Office is in writing (see: 37 C.F.R. §1.2⁴) and the proper authority for action on any matter in this regard are the statutes (35 U.S.C.), regulations (37 C.F.R.) and the commentary on policy (MPEP). Therefore, no telephone discussion may be controlling or considered authority for Petitioner's action(s).


/John J. Gillon, Jr./
John J. Gillon, Jr.
Senior Attorney
Office of Petitions

⁴ The regulations at 37 C.F.R. §1.2 provide:

§1.2 Business to be transacted in writing.

All business with the Patent and Trademark Office should be transacted in writing. The personal attendance of Petitioners or their attorneys or agents at the Patent and Trademark Office is unnecessary. The action of the Patent and Trademark Office will be based exclusively on the written record in the Office. No attention will be paid to any alleged oral promise, stipulation, or understanding in relation to which there is disagreement or doubt.